

§ 275.202(a)(1)-1

17 CFR Ch. II (4-1-10 Edition)

organization for purposes of the Investment Advisers Act of 1940 shall mean an investment adviser that:

(1) Has assets under management, as defined under Section 203A(a)(2) of the Act (15 U.S.C. 80b-3a(a)(2)) and reported on its annual updating amendment to Form ADV (17 CFR 279.1), of less than \$25 million, or such higher amount as the Commission may by rule deem appropriate under Section 203A(a)(1)(A) of the Act (15 U.S.C. 80b-3a(a)(1)(A));

(2) Did not have total assets of \$5 million or more on the last day of the most recent fiscal year; and

(3) Does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of \$25 million or more (or such higher amount as the Commission may deem appropriate), or any person (other than a natural person) that had total assets of \$5 million or more on the last day of the most recent fiscal year.

(b) For purposes of this section:

(1) *Control* means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise.

(i) A person is presumed to control a corporation if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or

(B) Has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities.

(ii) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership.

(iii) A person is presumed to control a limited liability company (LLC) if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the interests of the LLC;

(B) Has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the LLC; or

(C) Is an elected manager of the LLC.

(iv) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

(2) *Total assets* means the total assets as shown on the balance sheet of the investment adviser or other person described above under paragraph (a)(3) of this section, or the balance sheet of the investment adviser or such other person with its subsidiaries consolidated, whichever is larger.

[63 FR 35515, June 30, 1998, as amended at 65 FR 57448, Sept. 22, 2000]

§ 275.202(a)(1)-1 Certain transactions not deemed assignments.

A transaction which does not result in a change of actual control or management of an investment adviser is not an assignment for purposes of section 205(a)(2) of the Act.

[51 FR 32907, Sept. 17, 1986; 64 FR 2567, Jan. 15, 1999]

§ 275.202(a)(11)-1 Certain broker-dealers.

(a) *Special compensation.* A broker or dealer registered with the Commission under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) (the "Exchange Act"):

(1) Will not be deemed to be an investment adviser based solely on its receipt of special compensation (except as provided in paragraph (b)(1) of this section), provided that:

(i) Any investment advice provided by the broker or dealer with respect to accounts from which it receives special compensation is solely incidental to the brokerage services provided to those accounts (including, in particular, that the broker or dealer does not exercise investment discretion as provided in paragraphs (b)(3) and (d) of this section); and

(ii) Advertisements for, and contracts, agreements, applications and other forms governing, accounts for which the broker or dealer receives special compensation include a prominent statement that: "Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on

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what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time." The prominent statement also must identify an appropriate person at the firm with whom the customer can discuss the differences.

(2) Will not be deemed to have received special compensation solely because the broker or dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater than or less than one it charges another customer.

(b) *Solely incidental to.* A broker or dealer provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act or to the brokerage services provided to accounts from which it receives special compensation within the meaning of paragraph (a)(1)(i) of this section if the broker or dealer (among other things, and without limitation):

(1) Charges a separate fee, or separately contracts, for advisory services;

(2) Provides advice as part of a financial plan or in connection with providing financial planning services and:

(i) Holds itself out generally to the public as a financial planner or as providing financial planning services;

(ii) Delivers to the customer a financial plan; or

(iii) Represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services; or

(3) Exercises investment discretion, as that term is defined in paragraph (d) of this section, over any customer accounts.

(c) *Special rule.* A broker or dealer registered with the Commission under section 15 of the Exchange Act is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker or dealer to the Advisers Act.

(d) *Investment discretion.* For purpose of this section, the term *investment discretion* has the same meaning as given in section 3(a)(35) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(35)), except that it does not include invest-

ment discretion granted by a customer on a temporary or limited basis.

[70 FR 20454, Apr. 19, 2005]

§ 275.203-1 Application for investment adviser registration.

(a) *Form ADV.* To apply for registration with the Commission as an investment adviser, you must complete and file Form ADV (17 CFR 279.1) by following the instructions in the Form.

(b) *Electronic filing.* (1) If you apply for registration after January 1, 2001, you must file electronically with the Investment Adviser Registration Depository (IARD), unless you have received a hardship exemption under § 275.203-3.

NOTE TO PARAGRAPH (b)(1): Information on how to file with the IARD is available on the Commission's website at <http://www.sec.gov/iard>.

(2) You are not required to file with the Commission a copy of Part II of Form ADV if you maintain a copy of your Part II (and any brochure you deliver to clients) in your files. The copy maintained in your files is considered filed with the Commission.

NOTE TO PARAGRAPH (b)(2): The Commission has proposed, but not adopted, substantial changes to Part II of Form ADV. Thus, the rules for preparing, delivering, and offering Part II (or a brochure containing at least the information contained in Part II) have not changed. If you are an SEC-registered adviser, however, you no longer have to file Part II with the Commission. Instead, you must keep a copy in your files, and update the information in your Part II whenever it becomes materially inaccurate. State law may continue to require you to file Part II with the appropriate State securities authority on paper, regardless of whether you are filing Part I on paper or through the IARD.

(c) *When filed.* Each Form ADV is considered filed with the Commission upon acceptance by the IARD.

(d) *Filing fees.* You must pay FINRA (the operator of the IARD) a filing fee. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed application for registration will not be accepted by FINRA, and thus will not be considered filed with the